

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF COLORADO

DOCKET NO. 04R-510T

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RULES RELATING TO THE REGULATION OF OPERATOR SERVICES FOR  
TELECOMMUNICATIONS SERVICE PROVIDERS AND TELEPHONE UTILITIES

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**COMMENTS OF MCI, INC.**

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MCI, Inc., on behalf of its regulated subsidiaries, submits these Comments.

**I. STATEMENT OF POSITION**

A recent FCC Report and Order (“FCC R&O”) established a new per-call default compensation rate per call for the payment of payphone compensation to payphone service providers (“PSPs”), increasing it from \$.24 to of \$.494.<sup>1</sup> In its Notice of Proposed Rulemaking (“NPRM”), this Commission purports to make permanent, its emergency rule to modify the default rate of payphone compensation for “dial around” calls consistent with the Federal Communication Commission’s (“FCC”) most recent default compensation rate.<sup>2</sup>

First, the Commission mischaracterizes its proposed action. It purports to set the default compensation rate at \$.50 per call. But in fact it proposes to cap payphone compensation surcharges of carriers responsible for payphone compensation at \$.50, a level which does not allow MCI to recover the costs of administering a very expensive and complicated payphone compensation system mandated by the FCC.

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<sup>1</sup> In the Matter of Request to Update Default Compensation Rate for Dial-Around Calls from Payphones, Report and Order (“FCC R&O”), WC Docket No. 03-225, FCC 04-182, rel. August 12, 2004

<sup>2</sup> In the Matter of Rules Relating to the Regulation of Operator Services for Telecommunications Providers and Telephone Utilities, Docket No. 04R-510T, Notice of Proposed Rulemaking, adopted October 14, 2004.

Second, the FCC has mandated certain facilities-based carriers to administer the payment of compensation to PSPs, and in so doing has required them to establish expensive and complicated payphone compensation, tracking, reporting, and auditing procedures. The FCC has made clear that carriers are entitled to recover the costs of administering their payphone compensation systems and, consequently, surcharges may legitimately differ from, and be larger than, the default compensation rate. Implicit in this understanding is that the costs of payphone compensation administration may differ among carriers.

Third, the Commission does not have jurisdiction to cap surcharges applied to recover payphone compensation. The FCC has exercised sole jurisdiction over all payphone rates, coin and non-coin. Both payphone compensation, and the recovery of payphone compensation administration costs, are entirely subject to the FCC's jurisdiction.

The Commission should therefore entirely refrain from setting any cap on payphone compensation surcharges that carriers may choose to apply.

## **II. THE COMMISSION'S PROPOSED CAP ON THE RECOVERY OF COSTS ASSOCIATED WITH PAYPHONE COMPENSATION IS ARBITRARY AND CAPRICIOUS**

In its Notice of Proposed Rulemaking ("NPRM"), the Commission purports to make permanent, its emergency rule to "modify the default rate of payphone compensation for 'dial around calls consistent with the Federal Communication Commission's ("FCC") most recent 'default compensation rate.'" <sup>3</sup> However, the FCC has already established the default per-call compensation rate at \$.494 per completed call, an increase of \$.254 from its prior per-call default rate of \$.24. <sup>4</sup> There is no need for the Commission to establish its own default compensation

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<sup>3</sup> NPRM at 1

<sup>4</sup> FCC R&O.

rate. This rate is a payment made by carriers to PSPs and is different than rates or surcharges carriers may apply to end-users in order to recover costs associated with payphone compensation. In fact the Commission has actually established an arbitrary cap on surcharges carriers may apply to end-users in order to recover costs associated with payphone.

Prior to this NPRM, the Commission had established a cap on the recovery of payphone compensation related costs equal to \$.26 per call. At the time, the FCC default compensation rate was \$.24 per call. The Commission cap of \$.26 essentially validated the \$.02 costs of administering the payphone compensation mandated by the FCC that had become standard industry practice. When the default compensation rate was \$.24, average administrative costs were at least \$.02.<sup>5</sup> The FCC initially established a default, per-call, payphone compensation rate of \$.24 per call by dividing the cost of providing a payphone to a marginal location (\$101.29) by the average call volume of 438 at marginal payphone locations and then adding in \$.0009 per call for payment lag.<sup>6</sup> The \$.02 per-call cost of administering dialaround payphone compensation was spread over an average call volume of 155 dial around calls.<sup>7</sup> The FCC's R&O concluded that average call volumes at marginal payphone locations had declined from 438, when the \$.24 default rate was established to 191, a 60% reduction.<sup>8</sup> Spreading even the \$.02 administrative cost across 60% fewer calls would require adding \$.05 to the cost of every

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<sup>5</sup> A subsequent internal analysis revealed MCI's administrative costs to be at least \$.03 per call.

<sup>6</sup> Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128 Third Report and Order and Order on Reconsideration of the Second Report and Order, 14 FCC Rcd 2545 (1999) ("FCC Third Report and Order"), &191.

<sup>7</sup> Id., &151.

<sup>8</sup> FCC R&O, &80.

call in order to break even. Thus, in order to pay PSPs \$.494 per completed dialaround call, carriers would need to recover at least \$.54 per call.

However, the FCC has imposed substantial costs on carriers responsible for payphone compensation since the establishment of its first default rate. In addition to paying for dialaround calls on a per-call basis, carriers also must compensate PSPs on a per-phone basis for calls established according to a schedule established in the FCC's 2002 Fifth Payphone Reconsideration Order. The FCC made these payments encompass payphones that had not sent coding digits going back to October 1997.<sup>9</sup> Since these payments are made according to each payphone that does not pass coding digits, when recovered on a per-call basis, they substantially add to the differential between the default per-call compensation rate and the per-call surcharge carriers needed to apply in order to recover their dialaround related costs. More recently, the Commission required carriers responsible for payphone compensation to undergo expensive audits by independent auditors attesting to the accuracy of their payphone compensation system.<sup>10</sup> MCI spent over \$1 million over a 9 month period in order to comply with this requirement.

In short, MCI's cost of administering payphone compensation have substantially increased since the default compensation rate was first established in 1999, and the volume of calls over which it may recover these increased costs have been reduced by 60%. MCI can

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<sup>9</sup> Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128 Fifth Order on Reconsideration and Order on Remand, FCC 02-292, ("FCC Fifth Order on Reconsideration"), rel. October 23, 2002, Appendices A,B, and C. See also 47 C.F.R. ' 64.1301.

<sup>10</sup> Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128 Report and Order on Remand, FCC 03-225, ("FCC Second Toll Gate Order"), rel. October 3, 2003

barely break even with a surcharge of \$.55 per call. Other carriers may have even higher administrative costs and higher retroactive per-phone payments to recover.

The Commission had formerly accepted the \$.02 per call cost of administering payphone compensation that had become industry practice in 1999. But now, even though call volumes have substantially decreased and administration costs have dramatically increased, this Commission only allows \$.006, more than two-thirds less for the recovery of the costs associated with the FCC mandate of administering payphone compensation payments, tracking, reporting, and auditing. The Commission provides no explanation why \$.02 was once appropriate, but now, when circumstances indicate that per-call administration costs have tripled, the Commission has reduced per-call recovery of administrative costs by 70%. The Commission must take this opportunity to avoid reversible error, and determine that at a minimum, each carrier responsible for dialaround payphone compensation is entitled to recover all of its payments to PSPs and the costs of tracking, reporting, compensating, and auditing its payphone compensation system. At a minimum, each carrier responsible for dialaround compensation should be allowed to tariff its own payphone compensation surcharge.

### **III. THE FCC HAS DETERMINED THAT MARKET FORCES WILL ESTABLISH THE APPROPRIATE LEVEL AT WHICH CARRIERS CHOOSE TO RECOVER THE COST OF ADMINISTERING PAYPHONE COMPENSATION**

Although Section 276 of the Telecommunications Act of 1996 required the FCC to establish a system to ensure that PSPs were compensated for the use of their payphones, it did not determine who would be responsible for paying PSPs for dialaround calls or coin calls for that matter.<sup>11</sup> In implementing Section 276, the FCC determined that facilities-based carriers were responsible for compensating PSPs for dialaround calls, and also determined that

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<sup>11</sup> 47 U.S.C. § 276 (b)(1)(A)

competition among carriers would establish the appropriate level and manner in which manner and level responsible carriers would recover the costs associated with administering payphone compensation. The FCC concluded that:

“...the carrier-pays system also gives IXC's the most flexibility to recover their own costs (of administering payphone compensation, whether through increased rates to all or particular customers, through direct charges to access code call or subscriber 800 customers, or through contractual agreements with individual customers. Although some commenters would have the Commission limit the ways in which carriers could recover the cost of per-call compensation, we conclude that the marketplace will determine, over time, the appropriate options for recovering these costs. **In addition, under the carrier-pays system, individual carriers, while obligated to pay a specified per-call rate to PSPs, have the option of recovering either a different amount from their customers, including no amount at all.**”<sup>12</sup> (emphasis added)

In its more recent Fifth Order on Reconsideration, the FCC clarified that the ability to recover a different amount from end-user customers imposed no limit on the surcharge that carriers were entitled to apply towards the recovery of their costs of administering payphone compensation for PSPs. (*“In a market with unregulated prices, the carriers were entitled to charge their customers a surcharge for per-call compensation or, indeed, to raise the retail rate to any level they think the market will bear.”*)<sup>13</sup> The FCC clearly expected market forces to establish the differential between payphone compensation paid by facilities-based carriers to PSPs and the surcharge (if utilized) that would be applied to these carriers end-user customers.

#### **IV. THIS COMMISSION DOES NOT HAVE AUTHORITY OVER PAYPHONE SURCHARGES**

The FCC has completely occupied the field of payphone rates; whether this involves coin or non-coin payphone calls; intrastate or interstate payphone calls, or the level of surcharges

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<sup>12</sup> Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128 Report and Order on Remand, FCC 96-338, (“FCC First Report and Order”), rel. September 20, 1996, & 83.

<sup>13</sup> FCC Fifth Order on Reconsideration, & 80.

carriers responsible for dialaround payphone compensation might apply to their end-user customers for this duty. As the FCC noted in its First Report and Order, “Section 276(b)(1)(A) directs the Commission to establish a plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone.”<sup>14</sup> On the basis of this statutory authority, the FCC asserted jurisdiction over both local coin calls and dialaround calls. (*“Further, Section 276(b)(1)(A) gives the Commission both the jurisdiction to ensure fair compensation for local coin calls and the mandate to establish a plan to compensate PSPs on a per-call basis”*).<sup>15</sup> And as discussed immediately above, the FCC also allowed carriers responsible for dialaround compensation the discretion, to set a surcharge to recover its payphone compensation costs (including the cost of administering its payphone compensation system) at whatever level it felt necessary, subject to the constraints of a competitive market.

Therefore, if a carrier chooses to recover payments for completed dial-around calls by means of a surcharge (which is universally the case) this surcharge is also an interstate recovery charge. This is so even if the call on which the surcharge is placed happens to be an intrastate call. The situation is analogous to the subscriber line charge (“SLC”). The SLC is an interstate surcharge placed by local exchange companies on their customers for the recovery of a portion of the costs of completing long distance calls on local networks. The surcharge is interstate, and is applied even if a customer does not make any interstate calls. Similarly, payphone compensation is a payment to PSPs for the use of their payphone, whether or not the call itself is

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<sup>14</sup> FCC First Report and Order, & 48.

<sup>15</sup> Implementation of the Pay Telephone and Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128, *Report and Order*, FCC 96-288, 11 FCC Rcd 20541 (rel. Sept. 20, 1996), &58

interstate or intrastate. Just as states have no authority to regulate payphone rates, they do not have authority to regulate surcharges carriers place on calls to recover payments associated with payphone rates under the FCC's jurisdiction.

## **V. CONCLUSION**

For the reasons discussed above, MCI urges the Commission to adopt the positions advocated herein.

Dated: November 30, 2004

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### **Statement of Verification**

I have read the foregoing, and to the best of my knowledge, information, and belief, there is good ground to support it, and it is not interposed for delay. I verify under penalty of perjury that the foregoing is true and correct.

Executed on November 30, 2004

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